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No. 82-195

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

VAN D. MUELLER and JUNE NOYES
Petitioners,

v.

CLYDE E. ALLEN, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF OF UNITED STATES CATHOLIC CONFERENCE *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The United States Catholic Conference ("USCC") respectfully moves this Court for leave to file a brief *amicus curiae* in support of Respondents in this case. Through their counsel, Respondents Clyde E. Allen and Brenda B. Becker, *et al.*, have indicated that they neither refuse nor consent to appearance of *amici*, thereby necessitating this motion. The consents of counsel for the Petitioners, and the Respondents Dennis J. Berthiaume, *et al.*, have been obtained.

The USCC is the civil agency of the Catholic Bishops in the United States. Its programs embrace the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, and communications and public affairs, with emphasis on the preservation of religious liberty in America.

This case raises the important question of whether the Establishment Clause prevents a state from allowing an in-

come tax deduction for educational expenses incurred by parents of children attending public and private schools, because some of those children attend religious or church-related schools.

This *amicus* believes (a) that resolution of the issues may be served by critical philological and historical analysis grounded in the legislative history of the Religion Clauses in the First Congress, and (b) that such an analysis will enhance the application of the principles presently at work in the cases. It is believed that the parties will not deal sufficiently with this aspect of the issues.

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is a non-profit membership corporation composed of all the Catholic Bishops in the United States. The programs of the USCC include the areas of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, youth activities, and communications, with emphasis on the preservation of religious liberty. When deemed appropriate and permitted by court rules or practice, the USCC offers its views in litigation touching important socio-moral and other issues pertinent to its areas of activity, particularly when they may affect the Catholic Church or its people in the United States.

The United States Court of Appeals for the Eighth Circuit has held that a Minnesota statute authorizing a limited income tax deduction for Minnesota taxpayers for certain school-related expenses does not violate the Establishment Clause of

the First Amendment. The statute benefits all eligible parents, regardless of religious beliefs, or the school attended by their children, public or private, church-related or not. A reversal of the decision of the Court of Appeals would adversely affect parents of school age children, Catholic as well as others, by increasing their tax burdens.

SUMMARY OF ARGUMENT

The Minnesota statute is constitutionally benign and clearly sustainable tax legislation under the applicable decisions of this Court. This *amicus* will not duplicate the Respondents' analysis demonstrating the correctness of that conclusion. Rather, it will endeavor to serve the Court by presenting a fresh historical and philological analysis of the Establishment Clause which renders the "primary effect" component of the Three-Part Test more workable by rooting it firmly in Establishment Clause objectives.

The House and Senate proceedings which forged the language of the Establishment Clause demonstrate, as Madison himself explained, that the objective was to forbid the establishment or preferment of one or more religions. History had taught the founders that such conditions lead to infringement of religious liberty. Although the House and Senate proceedings do not address the details of permissible interaction between church and state, colonial history demonstrates the need for a buffer zone of impermissible interaction to avoid a concrete and intolerable risk of eventual establishment or preferment.

The Court has drawn on colonial experience in recognizing that the public purse can be an instrument of establishment or preferment. Hence, it has carefully examined legislation which benefits churches and other religious groups, including in relation to educational programs. Although such care is doubtless appropriate, the constitutional vision has been somewhat distorted as a result of a skewed historical perspective in the seminal cases, notably *Everson* v. *Board of Education*, 330 U.S. 1 (1947).

According no consideration to the House and Senate proceedings, *Everson* attached overriding significance to the disestablishment history of Virginia, in particular Madison's Memorial and Remonstrance opposing a bill in the Virginia Assembly to impose a tax for the support of ministers. Thus influenced, the *Everson* opinion pronounced broadly against aid to religion, putting it almost on a judicial par with establishment and preferment themselves. Although the Court has cautioned against undue reliance on the *Everson* dicta, and pursued the common sense course of benevolent neutrality, *Everson's* conclusions are enduring obstacles to an Establishment Clause analysis rooted in the objectives the Religion Clauses were meant to serve.

When the Religion Clauses were being forged, there was a wide diversity of views and practices among the states with respect to church-state relations. These were reflected in the House and Senate proceedings. The words of the Establishment Clause represented a compromise between the versions finally approved by House and Senate. Analysis of those proceedings illumines those words to the point of undeniable precision in their thrust. The Establishment Clause was meant to lay down a principle. Its explicit proscriptions against establishment and preferment constitute the precise judgment of the framers. They did not explicitly or impliedly classify aid to churches or religious groups as inherently objectionable, hardly surprising given the diverse values and practices of the day. Instead, and typically, they left the development of prudential subsidiary principles for the future.

The Court's recent cases make clear that the contours of Establishment Clause analysis are still evolving and are amenable to enhancement. This *amicus* respectfully suggests that the subsidiary principles which determine the zone of impermissible interaction between church and state should derive their substance and direction more concretely from the explicit Establishment Clause objectives. Requiring a clearer and more concrete relationship between a particular law and those objectives would provide a stability of principle which would

greatly enhance the analytical process of applying the "primary effect" component of the Three-Part Test. Rooted in the reliable soil of precise legislative history, and generally guided by colonial experience, such an adjustment in emphasis would provide a more hospitable philosophical and analytical environment for the common sense principle of benevolent neutrality. It would provide needed relief from the subtle, inhospitable cross-currents yet in motion as a result of *Everson*.

This *amicus* does not propose a test, but rather an approach to guide decision. To do more would be presumptuous and unnecessary, particularly in this case which involves a statute which should survive the strictest demands of the decided cases.

ARGUMENT

I.

THE GENERATIVE HISTORY WHICH FORGED THE WORDS OF THE ESTABLISHMENT CLAUSE PROVIDES A BASIS FOR ENHANCING THE ANALYTICAL FRAMEWORK OF ESTABLISHMENT CLAUSE AID CASES

Petitioners challenge the constitutionality of the Minnesota statute[1] on the ground that it is a law "respecting an establishment of religion" in violation of the First Amendment.[2] Thus, religion has been thrust into a matter involving a state's tax policy which does not pose the remotest threat to authentic constitutional values. The statute is benign and easily withstands a principled application of this Court's decisions construing and applying the Establishment Clause. The Court of Appeals should be affirmed (discussed below at 29-30).

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[1] Minn. Stat. Ann. § 290.09, subd. 22 (West Supp. 1982).

[2] U.S. Const. amend. I provides in relevant part that "Congress shall make no law respecting an establishment of religion . . . ."

A. PURPOSE OF THIS *AMICUS*

It is generally agreed that the "Three Part-Test"[3] for assessing the validity of legislation under the Establishment Clause has not proven entirely satisfactory. Both Bench[4] and Bar[5], as well as the executive and legislative and branches,[6] have encountered acute difficulties in applying this analytical framework. The Court itself has recognized the difficulties, acknowledging that the diminished predictability of decision caused by a flexibility of approach "promises to be the case until the continuing interaction between the courts and the States . . . produces a single, more encompassing construction of the Establishment Clause." *Committee for Public Education, Etc.* v. *Regan*, 444 U.S. 646, 662 (1980). Clearly, the contours of analysis are in process and open to enhancement.

Consistent with its admonitions in other contexts,[7] the Court has warned against the mechanical application of the Three-

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[3] Under the precedents of this Court, a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion. *Committee for Public Education, Etc.* v. *Regan*, 444 U.S. 646, 653 (1980).

[4] *Public Funds for Public Schools* v. *Byrne*, 590 F.2d 514, 521 (3d Cir. 1979) (Weis, J., concurring), *aff'd mem.*, 442 U.S. 907 (1979).

[5] Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673 (1980).

[6] The seemingly anomalous results under the Three-Part Test create a practical dilemma for those who must shape and administer public policy, in fidelity to the Constitution as propounded by this Court. *See* Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations*, 3 Journal of Law and Education 101 (1974). What is a *reviewable* misunderstanding of constitutional principle in the judicial process can operate as an unwarranted and mischievous restraint upon legislative and executive judgment, with protracted social effects.

[7] *See American Communications Association* v. *Douds*, 339 U.S. 382, 394 (1950); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

Part Test: "[T]he tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired."[8] As the Chief Justice counseled in *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970), the overriding policy of benevolent neutrality requires a value judgment as to whether a particular law offends the objective and principles of the Establishment Clause. *See also Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 761 (1973). That was the measure by which the court below ultimately assessed its application of the Three-Part Test. *Mueller* v. *Allen*, 676 F.2d 1195, 1206 (1982).

Mindful of the limited historical analysis in the seminal cases (discussed below), this *amicus* respectfully suggests that the arduous experience of the intervening years justifies a critical reassessment of the historical underpinnings of the Religion Clauses. Within the framework of the essential principles at work in the cases, there is sound basis for enhancing the "primary effect" component of the Three-Part Test. This *amicus* presents a historical and philological analysis which should serve the Court by rooting the primary effect test more firmly in the authentic Establishment Clause objectives.

B. "GENERATIVE HISTORY" OF RELIGION CLAUSES

The history of religious strife and persecution predating the Constitution has been recounted often in the opinions of the Court. *See Everson* v. *Board of Education*, 330 U.S. at 8-11; *Engel* v. *Vitale*, 370 U.S. 421, 425-30 (1962). At the time, there was diversity of view and practice among the states regarding established religion. That diversity is discussed below at 14-16.

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[8] *Meek* v. *Pittenger*, 421 U.S. 349, 359 (1975); *cf. Tilton* v. *Richardson*, 403 U.S. 672, 677-78 (1971).

The history which is most germane to the meaning of the Religion Clauses is the process of their evolution in the First Congress and the ensuing ratification process. Yet, because they were a product of reaction to the Constitution itself, it is necessary to begin at that threshold.

1. Constitutional Convention Of 1787 And Ratification By States

Religion was not a major concern of the Constitutional Convention of 1787. The only reference to religion in the proposed Constitution appeared in Article VI which provided, in part, that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[9]

During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia[10] specifically addressed the issue of religious freedom. The ratifying acts of four of them (New Hampshire excepted) addressed the issue of an established religion in terms of preferring one religion over others. Virginia proposed the following amendment on June 27, 1788:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of

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[9] *V Debates on the Adoption of the Federal Constitution* 564 (2d ed. J. Elliot ed. 1836).

[10] Of these states Rhode Island and New York did not make a recommendation for a religious amendment but each did include in its ratifying act a declaration of principles which included statements on religious liberty. *See* notes 12 and 13 *infra*.

conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*[11] (Emphasis added.)

The scored language appeared in virtually identical form in the ratifying acts of New York,[12] Rhode Island,[13] and North Carolina.[14] Desirous of protecting its own religious establishment,[15] New Hampshire proposed an amendment reading: "Congress shall make no laws touching religion, or to infringe the rights of conscience."[16]

In contrast, there was substantial opinion that the explicit protection of religious liberty was unnecessary because the federal government lacked authority over religion, and because adequate protection was supplied by the ban on religious tests in Article VI and by the multiplicity of sects in the country. James Madison was among those who shared this view.[17]

2. Textual Development Of The Religion Clauses

The wording of the Religion Clauses was a compromise between the different texts finally approved by the House and Senate. The Religion Clauses evolved as follows:

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[11] III Elliot, *supra* note 9, at 659.

[12] I *id.* at 328.

[13] *Id.* at 334.

[14] IV *id.* at 244.

[15] *See* Corwin, *The Supreme Court As National School Board*, 14 Law and Contemporary Problems, 3, 11 (1949). New Hampshire's constitution on the date it ratified the Constitution contained a provision under which the legislature could authorize towns, corporate bodies, or religious societies to make provision at their own expense for the support and maintenance of public Protestant teachers of piety, religion and morality. N.H. Const. of 1784, Pt. I, Art. I, Section VI, 4 *American Charters, Constitutions and Organic Laws*— 1492-1908, 2454 (F. Thorpe ed. 1909).

[16] I Elliot, *supra* note 9, at 326.

[17] III *id.* at 330.

HOUSE LANGUAGE

Madison's Proposal — June 8

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

Select Committee — July 18

No religion shall be established by law, nor shall the equal rights of conscience be infringed.

Livermore's Language — August 15

Congress shall make no laws touching religion, or infringing the rights of conscience.

Ames Language — August 20

Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.

Final Text — August 24

Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

SENATE LANGUAGE

September 3

Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.

Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.

Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

Congress shall make no law establishing religion or prohibiting the free exercise thereof.

Final Text — September 9

Congress shall make no law establishing articles of faith or mode of worship or prohibiting the free exercise of religion . . . .

COMPROMISE

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof
>
> . . . .

Nothing in the House and Senate proceedings suggests that the thrust of the compromise differed in any material degree from the final House and Senate versions. It was directed against the preferment or establishment of religion.

3. The House Of Representatives

The major proceedings in the House took place on August 15, 1789, although final action did not occur until August 24th.

Madison Introduces First Version. The first version of the Religion Clauses was among a number of amendments to the Constitution proposed by Madison on June 8, 1789. It provided:

> The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

1 *Annals of Congress* 434 (Gales & Seaton eds. 1789) (emphasis added). He advised that many doubted amendments to the Constitution were necessary to secure individual liberty. *Id.* at 432. He also stated the amendments would "not injure the Constitution," *id.*, and were "likely to meet the concurrence [of the states] required by the Constitution." *Id.* at 433.

Select Committee's Version. The amendments were referred to a Select Committee. Because of the diversity of views on religious liberty among the states, it is important to note the Committee consisted of one representative (including Madison) from each state. *Id.* at 665. The Committee reported language similar to that proposed by Madison regarding establishing religion except that the word "national" had been

deleted.[18] Deletion of that word reflected a concern that the new government might be viewed as national rather than federal, with authority over state practices beyond its enumerated powers (discussed below at 23).

Madison Explains Intent. On August 15th the House considered the amendment reported by the Select Committee. Madison explained its meaning to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals* at 730. He also observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that "might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended." *Id.*

Concern Amendment Might Harm Religion. The language of the Select Committee's proposal ("No religion shall be established by law . . . .") evoked limited concern that it might be construed adversely to religion. Peter Sylvester of New York suggested the wording of the amendment "might be thought to have a tendency to abolish religion altogether." *Id.* at 729.[19] Benjamin Huntington of Connecticut agreed with Madison's statement of the intent, but he also expressed concern "that the words might be taken in such latitude as to be extremely harmful to the cause of religion." 1 *Annals* at 730. To illustrate, Huntington suggested the inability of a federal court to compel persons to support the religious societies to which they belonged, "for a support of ministers, or building of places of worship might be construed into a religious establishment."

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[18] National Archives and Records Service, *The Story of the Bill of Rights* 6 (1980).

[19] At least two commentators have concluded that Sylvester thought the language might be interpreted as forbidding all governmental assistance to religion. *See* W. Berns, *The First Amendment and the Future of American Democracy* 8 (1976); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment* 7 (1978).

Id. At the time, Connecticut authorized religious societies to tax their members for support.[20]

Madison Restates Intent. To assuage concerns such as those expressed by Sylvester and Huntington, Madison moved to insert the word "national" before religion which he thought "would point the amendment directly to the object it was intended to prevent." 1 *Annals* at 731. He "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.*

Samuel Livermore of New Hamshire was not satisfied with Madison's motion but did not elaborate on his objections. *Id.* Elbridge Gerry of Massachusetts also objected to the insertion of the word "national." Gerry's discussion reflected concerns expressed by opponents of the Constitution in state ratifying conventions that the Constitution established a national government rather than a federal government. *Id.* Madison withdrew his motion, but denied insertion of the word "national" would imply the government was a national one. *Id.*[21]

Livermore's Amendment. Livermore moved to amend the language to read "that Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals* at 731. This proposal is identical, except for a stylistic change, to that recommended by New Hampshire when it ratified the Constitution, above at 8, and can be attributed to a desire to protect her own religious establishment.[22] Livermore's proposal, which passed on August 15 without any recorded debate, was not the language finally adopted by the House.

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[20] *See* I A. Stokes, *Church and State in the United States* 411-12 (1950).

[21] In the course of debate, Gerry had suggested that the amendment would "read better if it was that no religious doctrine shall be established by law." I *Annals* at 730. Roger Sherman of Connecticut thought the amendment unnecessary because Congress had no authority whatever delegated by the Constitution to make religious establishments. *Id.* Daniel Carroll of Maryland was in favor of the amendment because it would tend to conciliate the minds of those who felt the rights of conscience were not well secured under the Constitution. *Id.*

[22] Corwin, *supra* note 15.

Final House Text. On August 20th the House passed the motion of Fisher Ames of Massachusetts (the last state to abandon an established religion in 1833) to change the wording to "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." 1 *Annals* at 765. With minor stylistic changes, it was ultimately sent to the Senate on August 24th. *Id.* at 778. The *Annals of Congress* do not record the debate, if any, on the Ames wording.

Insofar as establishment is concerned, the Ames and House versions are indistinguishable in substance from that proposed by the Select Committee. Madison's explanations of intent give importance to this fact.

4. The Senate

On September 3rd the Senate twice agreed to amend the language approved by the House. First, it approved this language: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed."[23] The Senate then rejected two other versions of the amendment[24] and a motion that the entire amendment be stricken. I DePauw, *supra* note 23, at 151. The Senate finally approved: "Congress shall make no law establishing religion or prohibiting the free exercise thereof." *Id.*

On September 9th the Senate passed its final version, to which it added other guarantees of liberty (free speech, free press, peaceable assembly and petition). The Religion Clauses read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . ." *Id.* at 166. There are no records of the debates in the Senate.

[23] I *Documentary History of the First Federal Congress of the United States* 151 (L. DePauw ed. 1972).

[24] The rejected versions were (i) "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society," and (ii) "Congress shall make no law establishing any particular denomina-

5. Ratification By The States

The Bill of Rights was ratified by the states with a notable lack of comment on the First Amendment.[25] Only in the Virginia Senate was concern expressed that the First Amendment was not broad enough to prevent preferential treatment among religions (discussed below at 18).

C. DIVERSITY OF RELIGIOUS PRACTICES AMONG THE STATES—VIRGINIA ATYPICAL

The Religion Clauses were molded to meet the needs and wishes not only of the people of Virginia, but of all the states. Their views and sentiments on the appropriate relation of government to religion varied greatly. The undue influence of Virginia's disestablishment history on Establishment Clause law (discussed below at 16-21) requires a sharp focus on the great diversity of religious practice among the states.

The panorama of opinion on church-state relations found expression in the laws of the states, as succintly catalogued by Sanford H. Cobb:

> Two out of thirteen, Virginia and Rhode Island, conceded full freedom; [o]ne, New York, gave full freedom except for requiring naturalized citizens to abjure foreign allegiance and subjection in all matters ecclesiastical and civil; [s]ix, New Hampshire, Connecticut, New Jersey, Georgia, North and South Carolina, adhered to religious establishment; [t]wo, Delaware and Maryland, demanded christianity; [f]our, Pennsylvania, Delaware, North and South Carolina, required assent to the divine inspiration of the Bible; [t]wo, Pennsylvania and South Carolina, imposed a belief in heaven and hell; [t]hree, New York, Maryland, and South Carolina, excluded ministers from civil office; [t]wo, Pennsylvania and South Carolina, emphasized belief in one eternal God; [o]ne, Delaware, required assent to the doctrine of the Trinity; [f]ive, New

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tion of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.*

[25] C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment* 157 (1963).

> Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, insisted on Protestantism; [o]ne, South Carolina, still referred to religious 'toleration'.[26]

In their practices as well, states varied. For instance, while Virginia prohibited obligatory support of any religious place or ministry,[27] states such as Connecticut, Maryland, New Jersey, North Carolina, Pennsylvania, and Georgia recognized a right to refrain from taxation for the support of a church other than one's own, but permitted taxation for the support of a church which one had joined.[28] Massachusetts and New Hampshire empowered the legislatures to authorize towns and religious societies to provide for the support of public Protestant teachers of piety, religion, and morality, although certificates of dissent directing tax support to one's own church were permitted to be filed.[29]

Virginia opposed incorporation of churches, while Delaware, New Jersey, and Pennsylvania permitted incorporation. Maryland permitted incorporation but was reluctant to grant corporate status in practice. South Carolina opposed incorporation for dissenting churches. New Hampshire approved incorporation for all, but in practice favored the Congregational church.[30]

It thus is evident that the great number of people who ratified the First Amendment in the states did not share a church-state tradition in common with Virginia or each other. Rather, the experience of Virginia was unique to most early Americans. It cannot reasonably be presumed to have been the desired prototype of a people who with deliberation selected

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[26] I A. Stokes, *supra* note 20, at 444, citing S. Cobb, *The Rise of Religious Liberty in America* 507 (1902).

[27] *Sources and Documents Illustrating the American Revolution* 207 (2d ed. S. Morison ed. 1929).

[28] Antieau, *supra* note 25, at 36-38.

[29] I Stokes, *supra* note 20, at 424, 429.

[30] Antieau, *supra* note 25, at 82-86.

very different models of church-state accommodation. The First Amendment, ratified by representatives and conventions of eleven states, was the product of all these models.

D. THE UNDUE INFLUENCE OF VIRGINIA'S HISTORY UNDER *EVERSON*

The interpretative importance of the generative history of the Establishment Clause was effectively blunted by its omission from consideration in *Everson*, the very threshold of Establishment Clause analysis.

The briefs in *Everson* did not treat the House and Senate proceedings. The principal historical discussion is found in the brief filed by the American Civil Liberties Union which concentrated on Virginia disestablishment history as it was recounted in the early free exercise polygamy case of *Reynolds* v. *United States*, 98 U.S. 145 (1879). Drawing on *Reynolds*, *Everson* tied its conclusions to Virginia history as it is revealed by the Virginia Bill for Religious Liberty, Madison's "Memorial and Remonstrance Against Religious Assessments," and Jefferson's "wall of separation" letter to the Danbury Baptists. The overriding importance attached to this history has been noted in subsequent cases.[31]

Everson's sweeping assertions against aid to religion, restated a year later in *McCollum* v. *Board of Education*, 333 U.S. 203, 210-11 (1948), have since been qualified. *See Walz* v. *Tax Commission*, 397 U.S. at 668; *Board of Education* v. *Allen*, 392 U.S. 236, 250-51 (1968) (Black, J., dissenting). However, they severely restricted the interpretative value of the precise generative history when it was discussed fourteen years later in *McGowan* v. *Maryland*, 366 U.S. 420, 440-42

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[31] *See Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 770; *Braunfeld* v. *Brown*, 366 U.S. 599, 602 (1961); *McGowan* v. *Maryland*, 366 U.S. 420, 437 (1961).

(1961). Although that history was fully briefed in *McCollum*,[32] it was not discussed in the majority opinion by Justice Black who had also authored the *Everson* opinion.

Although the Virginia experience is assuredly a relevant part of a balanced historical analysis, it has unduly influenced analysis in Establishment Clause cases. The *Everson* opinion could have given more effect to its observation (330 U.S. at 11) that the meaning of the Religion Clauses cannot be derived solely from the experience of any one colonial group or locale. The discussion which follows further assesses the probative value of Virginia history.

1. Virginia Bill For Religious Liberty.

Everson suggested that the Religion Clauses were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Bill for Religious Liberty enacted in 1786 ("Virginia Bill"). *Everson* v. *Board of Education*, 330 U.S. at 13. However, the operative language of the Virginia Bill reveals the difficulty with this view:

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .

Id. This Bill differed greatly (a) from that which Virginia recommended two years later as an amendment to the Constitution, (b) from that which Madison proposed, and (c) from that which was finally included in the Establishment Clause. The history already discussed makes clear that a number of states would not have agreed to an amendment with the breadth of the Virginia Bill.

To the extent Virginia's estimate of *federal* establishment needs is relevant, no source is more conclusive than the amend-

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[32] Brief for Appellees, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

ment it proposed when it ratified the Constitution. Quoted in full above at 7-8, it bears restatement here:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*[33] (Emphasis added.)

Virginia appreciated the very real difference between attending to its own concerns, and those of the federal government in its relations with all the states.

Finally, although its concerns seem unfounded in retrospect, on December 12, 1789 the Virginia Senate expressed grave disappointment over the First Amendement (then the third). Its recorded sentiments concluded that, in all respects including the Religion Clauses, the First Amendment "will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia."[34] The eleventh and last state necessary for ratification, Virginia postponed its acceptance until December 15, 1791, two years later.

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[33] III Elliot, *supra* note 9, at 659.

[34] The 3d amendment, recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time render it as powerful and dangerous as if it was established as the national religion of the country.

This amendment then, when considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and *betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia* and other states, for the protection of these rights. Journal of the Senate of the Commonwealth of Virginia, 1785-1790, at 62-63 (1828) (emphasis added).

The point here is not substantive, but only that it is imprecise to consider the Religion Clauses as the embodiment of the spirit and accent of the Virginia Bill.

2. Madison's Memorial And Remonstrance Against Religious Assessments

Madison's Memorial must be assessed in context. It was written four years before the Religion Clauses were hammered out. His purpose was to oppose A Bill Establishing A Provision for Teachers of the Christian Religion ("Bill") pending before the Virginia Assembly.[35] It was "an impassioned reaction," *Flast* v. *Cohen*, 392 U.S. 83, 104 n.24 (1968), to a bill intended to impose a tax for the support of ministers at a time when Virginia was in the last stages of established Anglicanism. The Memorial itself indicates that Madison's concept of an established religion was one that enjoyed a preferred status and to which others might be obliged to conform.[36] Madison's opposition to the Bill accords with his stated understanding of the meaning of the Establishment Clause, discussed above at 11-12. It would seem futile to attempt to contradict or vary that understanding by reference to his Memorial.

As demonstrated, the Religion Clauses were the result of a political process which, typically, produced compromise. The Memorial cannot be considered as Establishment Clause bedrock anymore than the Virginia Bill can be so viewed.

3. Wall Of Separation - Jefferson's Metaphor

Thomas Jefferson was in France when the Religion Clauses were developed, debated and adopted.[37] Thirteen years later he employed the "wall of separation" metaphor when he declined a request of the Danbury Baptist Association to pro-

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[35] Both the Bill and Madison's Memorial are appended to Justice Rutledge's dissenting opinion in *Everson*, 330 U.S. at 63-74.

[36] *See* Corwin, *supra* note 15, at 10.

[37] I. Cornelison, *The Relation of Religion to Civil Government in The United States* 93-94 (1895).

claim a day of fast and prayer in thanksgiving.[38] His refusal may be contrasted with President Washington's proclamation of a day of public thanksgiving and prayer,[39] pursuant to the House's resolution one day after Congress approved the text of the Religion Clauses, 1 *Annals* at 914-15, and with this Court's views in *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). Like Madison's Memorial, Jefferson's metaphor should not be put in service of objectives beyond its purpose and intent. The principle he was expounding was government's lack of authority over religious practice or belief. *Reynolds* v. *United States*, 98 U.S. at 164. The hazard of undue reliance on Jefferson's metaphor becomes more apparent when it is considered in light of his demonstrated church-state philosophy.

In 1803, Jefferson submitted for Senate approval a treaty with the Kaskaskia Indians that provided for an annual payment, for seven years, of one hundred dollars for the support of a Catholic priest and a single payment of three hundred dollars to assist in the building of a church.[40] On three occasions Jefferson extended a 1796 act which had authorized the issuance of patents, without payment, for three tracts of land to the Society of the United Brethren for propagating the Gospel among the Heathen.[41] Jefferson was President when tax exemption was first given churches in Washington by Congress. *Walz* v. *Tax Commission*, 397 U.S. at 684 (Brennan, J., concurring). Jefferson had recommended that the various religious sects be allowed to establish schools of theology on the confines of Virginia's public university.[42] Finally, on May 15, 1804, Jeffer-

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[38] "I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State." *Reynolds* v. *United States*, 98 U.S. at 164.

[39] *See* I Stokes, *supra* note 20, at 437-88.

[40] R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 261-63 (1982).

[41] *Id.* at 41-46.

[42] *See McCollum*, 333 U.S. at 245-46 (Reed, J., dissenting).

son wrote to The Ursulines of New Orleans, a Catholic religious order of nuns. Responding to their request for assurance of the continued operation of an orphanage, President Jefferson stated: "[T]he charitable objects of your institution cannot be indifferent to any; and it's [*sic*] furtherance of the wholesome purposes of society, by training of it's [*sic*] younger members in the way they should go, cannot fail to ensure it the patronage of the government it is under. Be assured it will meet all the protection which my office can give it."[43] The texts of Jefferson's and The Ursulines' letters are appended.

If one should look to Jefferson, his actions are far more meaningful than his metaphor.

E. ESTABLISHMENT CLAUSE ANALYSIS WITHIN FRAMEWORK OF ESSENTIAL JUDICIAL PRINCIPLES AND GERMANE HISTORY

Before undertaking the necessary analysis, it is useful to establish the essential contours of the decisional context which it is meant to serve.

The Fourteenth Amendment makes the Religion Clauses applicable to the states. *Everson* v. *Board of Education*, 330 U.S. at 8. Although the "clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another," *Larson* v. *Valente*, 102 S.Ct. 1673, 1683 (1982), its reach embraces certain acts and practices which do not themselves constitute a formal establishment or preferment of a religion or religions. *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 216 (1963); *McGowan* v. *Maryland*, 366 U.S. at 442; *Everson* v. *Board of Education*, 330 U.S. at 15-16. Yet an hermetic separation of church and state is not required. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602, 614

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[43] *See* I Stokes, *supra* note 20, at 677. The original of Jefferson's letter is located in the archives of the Ursuline Academy, 2635 State Street, New Orleans, Louisiana, 70118.

(1971). There is ample room in society for government's benevolent accomomodation of religion which "derives from an accommodation of the Establishment and Free Exercise Clauses." *Walz* v. *Tax Commission*, 397 U.S. at 669-70. That benevolence may not go so far as to jeopardize the fundamental objectives of the Establishment Clause, but there is no transgression merely because aid may free the recipient "to spend its other resources on religious ends." *Committee for Public Education, Etc.* v. *Regan*, 444 U.S. at 658; *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); *see also Roemer* v. *Board of Public Works*, 426 U.S. at 747.

For present analytical purposes, there is no more useful framework than this statement of the Chief Justice in *Walz:*

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

397 U.S. at 669. This states precisely the two levels of operative principle, namely, the immutable and inviolable constitutional precepts against establishment or preferment, and ancillary principles whose implication is necessary to preserve those precepts. The principles which determine the zone of impermissible governmental action should derive their substance from the explicit Establishment Clause objectives.

1. Establishment Clause Language

Whatever may be said of the clarity of the Establishment Clause considered *in vacuo*, its precise meaning emerges when the words are illumined by the process which forged them. The language purposefully and precisely effectuates the readily identifiable objectives of its framers. Had the Establishment segment of the Religion Clauses emerged in the versions previously considered in House and Senate, there would be no doubt that its objectives were the actual establishment or preference

of one or more religions. That was the precise concern of four of the five states which requested such an amendment when they ratified the Constitution. That was the precise objective stated and restated by Madison as sponsor in the House.

There was no tension or doubt related to these objectives, but the choice of words to reach them did engender certain anxieties born of other concerns. References to "national" religion evoked fears of an implication that the new government would be "national" and not "federal." However, more important for present purposes was the concern that the Religion Clauses might interfere with the autonomy of the states in religious matters, particularly the states which still countenanced preferred religion to one degree or another. Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause.[44]

As noted, the Religion Clauses are a House-Senate compromise. The task was to agree on language that would meet the major objectives of the recommending states as described by Madison, but which would respect the concerns of his peers. The language finally selected accomplishes these objectives in a skillful manner and becomes quite unambiguous in light of the concrete realities. The phrase "respecting an establishment" had two jobs to do, *i.e.*, prevent Congress from establishing or favoring a national religion, and prevent Congress from interfering with state religious practices. It did both well, and only violence to its purpose can ensue if suggestions of basic ambiguity are allowed to force other basic objectives upon the Establishment Clause.

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[44] *See* Corwin, *supra* note 15, at 10; Malbin, *supra* note 19, at 17; J. Story, *Commentaries on the Constitution of the United States* 731 (1833).

The phrase "respecting an establishment" cannot reasonably be read to mean concerning or touching upon religion. Indeed, that was the terminology of Livermore's proposal which was eventually rejected. The word "establish," or its derivatives, was consistently used to refer to preferred religions in the amendments recommended by the states, by Madison in the House debate, and in versions of the measure in both House and Senate. There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to expand the meaning of "an establishment of religion" or the scope of the Clause. As noted, the use of "respecting" made clear that Congress was also prohibited from passing laws affecting state establishments.[45]

The language of the Clause does not concern itself with religion in general but with the particular problem of *an establishment* of religion. There was no concern expressed during the August 15 debate that Congress might enact a law beneficial to religion or religious institutions. Such benevolence was not perceived as an evil. Had this been the concern it could have been dealt with simply by providing that "Congress shall make no law respecting religion" without introducing the more limited concept of "an establishment of religion."

It has been observed that if the authors of the Establishment Clause intended only the objective of prohibiting preferred or established religion, they could have simply so provided rather than choose the language they did. *Lemon* v. *Kurtzman*, 403 U.S. at 612. However, as demonstrated, such terminology was rejected by the First Congress for the reasons assigned. This *amicus* respectfully submits that the Establishment Clause is clearer than as perceived in *McGowan*, 366 U.S. at 441-42, and a few other cases[46] under the influence of *Everson*.

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[45] Malbin, *supra* note 19, at 16.

[46] The language has been referred to as "opaque," *Lemon* v. *Kurtzman*, 403 U.S. at 612; and as "sparse," *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 820 (White, J., dissenting).

2. Establishment And Religious Liberty

The Establishment Clause is part of the Bill of Rights. The canon *ejusdem generis* suggests, and the history of the Religion Clauses requires, that the Establishment Clause be viewed as a means for protecting individual liberty. *See* Madison's explanation of intent, above at 11. Especially is this so under the Fourteenth Amendment which applies the Establishment Clause to the states. That Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom.

The Establishment Clause has a functional relationship to religious liberty. As the Court has noted, it reflects the experience of its framers that officially preferred or established religion generates religious intolerance and persecution. *School District of Abington Township* v. *Schempp*, 374 U.S. at 221-22; *Engel* v. *Vitale*, 370 U.S. at 430-32; *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961). Both components of the Religion Clauses were meant to work to the same end. If the Establishment component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities of religious institutions which serve the public interest and which pose not the remotest threat to religious freedom.

3. Analytical Impact Of Everson

To the precise objectives of the Establishment Clause, the opinion in *Everson* engrafted a third couched in terms of aid to religion. This is the root of the difficulty, for by so doing this mode of governmental accommodation was rendered opprobrious and was reduced to the level of inherent constitutional vice. The abiding effect is the anguished tension between the common sense and tradition of benevolent neutrality, and the demands of a rule which seems to frustrate more than Establishment Clause objectives could reasonably require. Thus we

have witnessed the invalidation of such benign legislative accommodations as the loan of maps and the payment for costs of field trips to governmental and cultural centers. *Wolman* v. *Walter*, 433 U.S. 229, 248-55 (1977).

In *Walz* the Court noted that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. The presence of any of these elements raises a concern, as observed in *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971). However, whether a particular instance of aid must be nullified calls for a value judgment which must "turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz* v. *Tax Commission*, 397 U.S. at 669.

F. AN ENHANCED "PRIMARY EFFECT" COMPONENT

Of course, the objectives of the Establishment Clause must be scrupulously protected. The principle announced by the Chief Justice that "[a] law may be one 'respecting' the forbidden objective while falling short of its total realization" is a salutary one. *Lemon* v. *Kurtzman*, 403 U.S. at 612. However, it should not be applied on the basis of unfounded fears or suspicion,[47] for this leads inevitably to the frustration of reasonable government accommodation and *de facto* hostility.

The stigma which has attached to "aid" has not only led to the invalidation of benign laws enacted in the public interest, but it has generated the further constricting principle of sovereign surveillance as a condition to constitutional acceptance in some cases. *See, e.g., Lemon* v. *Kurtzman*, 403 U.S. at 619. The policing requirement conjoined to highly purgative standards

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[47] In *Allen* Justice Black dissented because he considered the legislation at issue the work of "powerful sectarian regligious propagandists . . . looking toward complete domination and supremacy of their particular brand of religion." 392 U.S. at 251. In *Walz*, Justice Douglas was apprehensive that tax exemption, though seemingly *de minimis*, was "a long step down the Establishment path." 397 U.S. at 716.

has caused the demise of socially useful legislation which does not pose the remotest threat to religious liberty as secured by the Establishment Clause. It is one thing to invalidate laws which actually tend to "advance" religion in the establishment or preferment sense. It is quite another to do so merely because the law, despite its legitimate objectives, also serves constitutional principles of parental choice. *See Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

The Court has made clear that the Establishment Clause does not preclude governmental assistance to church-sponsored activities which serve the public interest. *Tilton* v. *Richardson*, 403 U.S. at 679; *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). When the state respects the religious nature of its people and accommodates their spiritual needs, "it follows the best of our traditions." *Zorach* v. *Clauson*, 343 U.S. at 314. The zone of impermissible government accommodation should not include laws that do not involve a concrete and intolerable risk of establishment or preferment, realistically viewed. The judicial inquiry should not stop at whether a statute benefits religion, but whether it "advances" it in the prohibited constitutional sense. The principles which determine the zone of impermissible governmental action should derive their content explicitly from the Establishment Clause objectives, as a means to those constitutional ends. This would provide the analytical framework for judging the constitutionality of a particular law by its actual propensity to subvert ultimate constitutional values.

In the end, the question is whether the state has exercised its constitutional power in a way that so trenches upon the Establishment Clause that it is necessary to defeat its legitimate objectives. *Cf. Everson* v. *Board of Education*, 330 U.S. at 16. The question is fundamentally the same under the Free Exercise Clause, and was stated thus in *Cantwell* v. *Connecticut*, 310 U.S. 286, 307 (1940):

> We must determine whether the alleged protection of the State's interest, means to which end would, in the absence

> of limitation by the federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.

The state's interest in the education of its young is beyond serious question. It is also beyond dispute that the church-related schools of this nation serve the public interest in significant ways. *See Board of Education* v. *Allen*, 392 U.S. at 247-48; *Wolman* v. *Walter*, 433 U.S. at 262 (Powell, J., concurring).

Whether there is a concrete and intolerable risk of Establishment Clause evils is a function of contemporary circumstances. As Justice Powell observed in *Wolman*, 433 U.S. at 264:

> At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable *in light of the continuing oversight of this Court*. (Citation omitted.) (Emphasis added.)

As Justice Powell indicated, the Court is the ultimate security against establishment. The minute purgation of state legislation as a means to that end seems unnecessary in the absence of demonstrated mischief. Even before Justice Powell's sobering utterance, the Chief Justice counseled that limited aid for the benefit of school children "is not a step toward establishing a state religion—at least while this Court sits." *Meek* v. *Pittenger*, 421 U.S. 349, 387 (1975) (Burger, C. J., dissenting).

The vigilance of the Court should be sufficient consolation to all who treasure the religious liberty safeguarded by the Religion Clauses. Rooting the "primary effect" test more deeply in the soil of basic constitutional principle would provide a stability of course and analysis fully capable of culling laws which pose a concrete, intolerable risk of establishment evils. Society would be better served by destigmatizing "aid" under statutes

which, in truth, do no worse than lend a helping hand in simple justice to deserving people. Legislation which poses a significant danger can be dealt with in concrete circumstances, rather than avoided by a policy which fells the healthy tree to avoid the possibility of future disease.

This *amicus* does not propose a test, but rather an approach to guide decision. To do more would be presumptuous and unnecessary, particularly in a case which involves a statute which should *survive* the strictest demands of the decided cases.

II

THE MINNESOTA STATUTE THREATENS NO LEGITIMATE CONSTITUTIONAL VALUE, AND SATISFIES THE COURT'S THREE-PART TEST

The Court of Appeals properly concluded that the effects of the Minnesota statute are "quite far removed from those dangers which prompted inclusion of the Establishment Clause in the Bill of Rights." *Mueller* v. *Allen*, 676 F.2d at 1206.

As a matter of tax policy, Minnesota has simply elected to abstain from taxing the income of its citizens by providing a genuine deduction for educational expenses actually incurred by parents of all elementary and secondary school children. *Cf. Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 790 n.49. Tax deductions, like tax exemptions, do not involve a government subsidy through the transfer of public funds. *Cf. Walz* v. *Tax Commission*, 397 U.S. at 675. No taxpayer is compelled, through the use of tax funds, to contribute directly or indirectly to the support of religious activity in violation of the Establishment Clause. *Id.* at 667.[48]

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[48] It has been recognized that there is a qualitative difference between subsidies, where the state forcibly diverts the income of citizens to religious purposes, and tax exemptions where the state simply abstains from diverting to its own uses income independently generated by citizens or others. *Walz* v. *Tax Commission*, 397 U.S. at 690-91 (Brennan, J., concurring).

Unlike *Nyquist*, 413 U.S. at 793, the statute here does not single out a particular class of taxpayers for special treatment and is not intended to aid religious institutions. All parents are eligible for the deductions regardless of religious beliefs or the school attended by their children, public or private, church-related or not. Any benefits that may accrue to religious institutions under the Minnesota statute are indirect and remote, and certainly fall well within the principle of benevolent neutrality ammounced in *Walz*. 397 U.S. at 669, 676-77.

Measured both by reason and constitutional principle, this benign tax legislation is within the zone of permissible governmental discretion insofar as it includes taxpayers with childrer in church-related schools and poses no realistic threat to the religious liberty of any person. Applying the Three-Part Test, the purpose and primary effect of the Minnesota deductions are secular, *i.e.*, tax relief for parents, and are achieved without impermissible governmental involvement in religion.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Washington May the 15 1804

To the Soeur Therese de St. Xavier farjon Superior, and the Nuns of the order of St. Ursula at New Orleans.

I have recieved, holy sisters, the letter you have written me wherein you express anxiety for the property vested in your institution by the former governments of Louisiana. the [*sic*] principles of the constitution and government of the United States are a sure guarantee to you that it will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to it's [*sic*] own voluntary rules, without interference from the civil authority. whatever [*sic*] diversity of shade may appear in the religious opinions of our fellow citizens, the charitable objects of your institution cannot be indifferent to any; and it's [*sic*] furtherance of the wholesome purposes of society, by training up it's [*sic*] younger members in the way they should go, cannot fail to ensure it the patronage of the government it is under. be [*sic*] assured it will meet all the protection which my office can give it.

I salute you, holy sisters, with friendship and respect.

Th. Jefferson

Washington City Dec 25 1804

To the Soeur Therese de St. Xavier Forjon Superior, and the Nuns of the order of St. Ursula at New Orleans.

I have received, holy sisters, the letter you have written me wherein you express anxiety for the property vested in your institution by the former governments of Louisiana. the principles of the constitution and government of the United states are a sure guarantie to you that it will be preserved to you sacred and inviolate, and that your institution will be permitted to govern itself according to it's own voluntary rules, without interference from the civil authority. whatever diversity of shade may appear in the religious opinions of our fellow citizens, the charitable objects of your institution cannot be indifferent to any; and it's perseverance of the wholesome purposes of society, by training up it's younger members in the way they should go, cannot fail to ensure it the patronage of the government it is under. be assured it will meet all the protection which my office can give it.

I salute you, holy sisters, with friendship & respect.

Th: Jefferson

To Thomas Jefferson
President of the United States of America

Dear Sir:

The Ursuline Religious of New Orleans, encouraged by the honorable mention which you so kindly made of their order, take the liberty of having recourse to you in regard to some business which is of great concern to their Institute.

Although no express mention has been made of it, they think that the Treaty of Cession and still more the spirit of justice which characterizes the United States of America, will certainly guarantee to those seeking your help the continued enjoyment of their present property. But, keeping in mind that this same property is a sacred trust which has been confided to them, they believe that they would certainly fail in one of their principal obligations were they to neglect to see to it that this right to their property be put officially in writing, confirming their rights to this property not only for themselves but also for those of their Sisters who will succeed them; and, for this reason, to beg you, dear Sir, to present our petition to the Congress in the manner and form which you will judge the most suitable.

This request of the Ursulines of New Orleans is not dictated by personal interest nor ambitious aims. Separated from the world and its pomps and vanities, and, in a word, from all that is called its advantages, they have scarcely any ambition for earthly goods; but, bound by a solemn vow to use their time in the formation of youth, they cannot help but be anxious to know if they will be able with certainty to count on the continued enjoyment of their revenues which will enable them to fulfill their obligations. It is, then, less their own interests which they plead than it is that of the public good. In reality, it is the cause of the orphan and the abandoned child, of unfortunates brought up in the midst of the horrors of vice and infamy who come to be reared by us in the ways of Religion and virtue,

and be given a formation which will enable them one day to become happy and useful citizens. Finally, it is in the interest of this country which can but reap for itself honor and glory in encouraging and protecting an establishment as useful, and, we might even say, as necessary as ours. Dear Sir, we who seek your help dare to believe that these considerations will make an impression on you. Even more, we dare to count in advance on your protection.

We end by begging Heaven most fervently for your personal prosperity and for the happiness of the country whose great interests have been confided to you.

With the most profound respect, "Monsieur le President," we have the honor of being

Your very humble and very obedient servants

The Ursulines of New Orleans
Sr. Marie Therese Farjon of St. Xavier
Superior

March 21, 1804